FILE COPY

JUN 17 1958

JAMES R. BROWNING, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 933.

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,

Petitioners,

vs.

THE EVENING NEWS PUBLISHING COMPANY,

Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JEROME C. EISENBERG,
Counsel for Petitioners,
744 Broad Street,
Newark 2, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

TABLE OF CONTENTS.

	PAGE
REPLY BRIEF FOR PETITIONERS	1
CONCLUSION	5

CASES CITED.

Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, —— U. S. ——, 3 L. ed. 2d 741 (1959)	4
Northern Pacific R.R. v. *United States*, 356 U. S. 1 (1958)	4, 5
United States v. *American Ry. Express Co.*, 265 U. S. 425 (1924)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 933.

ALLIED NEWSPAPER CARRIERS OF NEW JERSEY, *et al.*,
Petitioners,

vs.

THE EVENING NEWS PUBLISHING COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF THEIR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The brief filed on behalf of the respondent requires a brief reply.

1. The respondent (Resp. Br. 3) insists upon introducing an alleged violation by petitioners of § 2 of the Sherman Act. The District Court held that the evidence failed "to sustain the charged violations of § 2 of the Sherman Act" (R. 632a). Since the respondent did not cross-appeal that finding to the Court of Appeals, it is strange to find respondent urging here that petitioners' conduct constituted a violation of § 2 of the Sherman Act. Its failure to appeal below should bar it from urging that ground now and later (if certiorari is granted). *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435 (1924).

2. In an attempt to inflate the effect of petitioners' activities on respondent's total circulation, the respondent's brief distorts the facts by failing to consider that in 1957 the News substituted home delivery for 16,000 of the 32,000 copies affected by the boycott, thus reducing the total number not delivered to 7½% of the home delivery market. (See Pet. Br. 6-7). Furthermore, respondent's brief makes reference to petitioners' second boycott affecting 50% of the "total circulation controlled by Home Delivery Dealers" (Resp. Br. 6). But the record shows that the District Court found the relevant market was the *entire* home delivery market (R. 626a), which includes deliveries by newsboys as well as by dealers.

While the record is not clear as to the total number of papers which are "home delivered" throughout the state, there is record evidence that the respondent had 2,500 newsboy routes (R. 119a) throughout New Jersey, operated by newsboys to whom the routes are lent (Ex. D-1; R. 603a), and that the News owns 604 such routes in Essex County alone (R. 163a). Its complaint alleged that 34,000 daily papers were delivered in Essex County by 603 [*sic*] newsboys (R. 31a). Thus it may be inferred that an average News newsboy distributes 57 papers. Multiplied by the 2,500 newsboys referred to, this means the "home delivery" by newsboys of 142,500 daily papers. When added to the total "home delivery" by dealers, an aggregate number of 209,500 daily papers appears to be "home delivered". This means the total number of papers undistributed, 16,000, constituted 7½% of *all home deliveries.*

3. The assertion by the respondent "that a 4% or 5% increase or decrease in circulation will affect advertising rates" (Resp. Br. 6) is directly contrary to the record evidence, supplied by its own witness (R. 310a to 317a). The respondent's witness, employed by an advertising agency which had represented the News for 63 years, testified that the 15-day boycott in 1956, did *not* result in any loss to the

respondent or decrease its advertising rates (R. 316a, 317a), and he did not know of any advertiser who complained (R. 316a). He refused to say whether a loss of 20,000 in circulation would hurt the respondent financially (R. 312a-315a). While the respondent did not produce any of its contracts with its advertisers, the same witness testified that such contracts contained no provision for revision because of a drop in circulation (R. 313a).

4. The respondent's brief (Resp. Br. 7) also distorts the alleged "dollar volume" effect of the boycott. The arithmetic indulged in by the respondent grossly and unfairly exaggerates the impact of the petitioners' acts. Respondent assumes that 32,000 papers were not delivered; as pointed out above, this simply is not so—only 15,000 daily papers were affected by the June, 1956, boycott (R. 622a-623a), and only 16,000 daily papers went undelivered during the 4 week trial period in May and June, 1957 (Pet. Br. App. A, p. 17). Secondly, respondent uses the dealers' weekly *sale price* (55¢) to show the effect upon the News. But the only meaningful figure, for purposes of showing the impact of petitioners' activity upon the News, is the revenue lost by the News, not that lost by the dealers—i. e., the dealers' weekly *cost price* paid to the News, 31.8¢ for six daily and 1 Sunday paper (R. 85a). If these correct figures are used, the dollar volume is 16,000 daily papers × 31.8 cents, for a total of *$5,088* per week, not *$17,000* a week as projected in respondent's brief. Nor can this amount fairly be multiplied into an annual volume. Since the record shows that newspapers purchased from the News by the dealers represented well over 90% of the afternoon business of the dealers called to the witness stand during the trial (Pet. Br. App. C, pp. 26, 27), it is wholly naive to suppose that the dealers could survive any protracted boycott. Their very livelihood depended upon the News' business. Nor is there an iota of record substantiation for respondent's final multiplication, based as it is on the wholly

unwarranted assumption that all home delivery dealers either are now or will become members of Allied.

[The discussion above, in Points 2, 3, and 4 of this Reply Brief, throws into focus the basic inadequacy of the decision below, and highlights the question upon which certiorari is sought by petitioners; namely, whether on this meager record, altogether lacking any comparative evidence of respondent's total annual revenue, profits attributable to the home dealers' business, etc., and in the complete absence of court findings as to economic power of Allied, it is valid to declare petitioners' action *per se* illegal.]

5. The accusation by the respondent that the "dealers again circularized large advertising customers of the respondent and advised them that there were approximately 40,000 of the respondent's papers not being delivered" (Resp. Br. 5) cannot be supported by the record. There was no proof that any member of Allied had called on any advertiser. The only evidence was that a committee was appointed to confer with advertisers (R. 443a).

6. Respondent's argument (Resp. Br. 9-11, 13-14) that no showing of power whatsoever is needed to declare a group boycott illegal *per se* is artifically sweetened by a concurrent distortion of petitioners' position on this point; namely, by the imputation that petitioners argue it must appear the boycotting group has power to destroy the boycotted party before the boycott could be considered illegal. Thus, respondent erroneously concludes that petitioners would not consider the boycott in *Klor's, Inc.*, v. *Broadway-Hale Stores, Inc.*, U. S. , 3 L. ed. 2d 741 (1959), to be illegal.

But it should be clear that petitioners have adopted no such extreme position. Petitioners' contention is that *some showing, and court finding upon,* economic power of the boycotting group is prerequisite to imposition of the *per se* rule. As to the degree of power that is essential, petitioners argue in the alternative: (1) assuming that *Northern Pacif-*

ic R. R. v. *United States*, 356 U. S. 1 (1958), controls by way of analogy, then the record must show and the court must find *sufficient* economic power to appreciably restrain free competition in the relevant market, which was not done in this case; (2) *Northern Pacific* does *not* control, and therefore the record must show and the court must find a broader economic power, namely, sufficient economic strength—contrasting in at least introductory, minimal fashion the position of the boycotters to that of the boycotted—to create a reasonable expectation that the boycott will produce a substantial coercive effect. In actuality, the boycotted party may well resist that effect; certainly he need not be driven out of business by it. *But he cannot be as apparently immune as respondent in this case, and still rely upon the per se rule.*

7. Another distortion by respondent of petitioners' position occurs at pages 12-13 of the answering brief where respondent apparently thinks petitioners argue that no agreement to boycott ever existed. That, of course, is not so; if it were, petitioners would hardly refer to pursuit of their "collective goal" (Pet. Br. 12; Resp. Br. 12). But petitioners do contend that adherence to the collective goal was enforceable by no economic control whatsoever of the boycotting group over the members thereof. Hence, Allied was able to conduct a 4-week boycott only because the individual members voluntarily desired to continue the boycott, not because the group had coercive powers over its members.

Conclusion.

For the reasons urged herein and in the petition, a writ of certiorari should be granted.

Dated: June 12, 1959.

Respectfully submitted,

JEROME C. EISENBERG,
Counsel for Petitioners.